UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ASSOCIATED PRESS, **Plaintiff,** **- against -** **UNITED STATES DEPARTMENT OF DEFENSE,** **Defendant.**	**ECF Case** **No. 05 Civ. 5468 (JSR)**

REPLY MEMORANDUM IN SUPPORT OF
PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

Plaintiff the Associated Press ("AP") submits this reply memorandum in further support of its cross-motion for summary judgment. Defendant United States Department of Defense ("DOD") in its March 13, 2006 opposition ("DOD Reply Mem.") largely reasserts positions advanced in its own motion for summary judgment and previously answered in AP's March 3, 2006 memorandum ("AP Mem."), which demonstrated that:

- The privacy provisions in Exemptions 6 and 7(C) do not authorize DOD to withhold detainee identifying information in records concerning allegations of detainee abuse at Guantanamo, AP Mem. at 10-17;
- The internal deliberations provision of Exemption 5 does not authorize DOD to withhold identifying information from the documents constituting the decision to transfer, release or continue confinement of a detainee, AP Mem. at 17-25; and
- The privacy protection in Exemption 6 does not permit DOD to withhold identifying information in personal correspondence submitted by two detainees to their Administrative Review Boards ("ARBs"), AP Mem. 26-29.

The few additional points raised in DOD's opposition may be readily dispatched and provide no proper basis to deny summary judgment in favor of AP.

ARGUMENT

A. DOD Should be Required to Locate and Produce All Documents Regarding the Release or Transfer of Detainees

DOD argues that it "reasonably" construed AP's request for documents concerning its decisions to transfer or release detainees as limited to ARB-related decisions, because another FOIA request made in the same letter was "expressly limited to the ARB process." DOD Reply Mem. at 2. Its argument ignores that other AP requests, including one for "copies of all allegations against the detainees," were not limited to material presented to the ARB tribunals. Compl. ¶ 19. Nor is DOD correct to suggest AP somehow waived any right to obtain release of other transfer documents unrelated to the ARB process by not raising the issue sooner. *See* DOD

Reply Mem. at 3-4. Before moving for summary judgment, DOD never advised AP that it had limited its search for transfer documents to documents in its ARB files, a point it does not dispute. In any event, because AP's FOIA request is not so limited on its face, the proper step should not be to dismiss the request at this point and require the process to start, but rather to correct DOD's misunderstanding and require it to search for and produce the additional information. *See, e.g.*, *Truitt v. Department of State*, 897 F.2d 540, 543-46 (D.C. Cir. 1990) (when an agency learned it was "mistaken" in its initial belief that a requester had not asked it to search particular files, the agency "came under a duty to conduct a reasonable search" of them, and "could not justify its inertia simply on the claim that [the requester] had not manifested" his interest earlier).

B. Exemption 3 Does Not Authorize DOD to Withhold Identifying Information in Letters Presented to the Administrative Review Board

DOD argues for the first time in its March 13, 2006 reply that it properly withheld under FOIA Exemption 3 identifying information contained in personal correspondence presented by two detainees to their ARBs. *See* DOD Reply Mem. at 10-16. Exemption 3 is FOIA's catch-all provision that allows an agency to withhold information that is "specifically exempted from disclosure by statute," as long as the statute "requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue" or "establishes particular criteria for withholding or refers to particular types of matter to be withheld." 5 U.S.C. § 552(b)(3). The statute that DOD now contends to require withholding is 10 U.S.C. § 130c, which authorizes the Secretary of Defense to withhold from public disclosure "sensitive information of foreign governments" when three specific conditions are met:

1. The information was "provided by, otherwise made available by, or produced in cooperation with, a foreign government or international organization." 10 U.S.C. § 130c(b)(1).

2. The foreign government or international organization provides a written representation that it is withholding the information from public disclosure. *Id.* § 130c(b)(2).

3. At least one of the following conditions exist:

> "(A) The foreign government or international organization requests, in writing, that the information be withheld.
>
> (B) The information was provided or made available to the United States Government on the condition that it not be released to the public.
>
> (C) The information is an item of information, or is in a category of information, that the national security officer concerned has specified in regulations prescribed under subsection (f) as being information the release of which would have an adverse effect on the ability of the United States Government to obtain the same or similar information in the future." *Id.* § 130c(b)(3).

DOD says this statutory exemption applies because the International Committee of the Red Cross ("ICRC") delivered the letters at issue, but its explanation of how the statute's conditions have been met cannot be squared with the plain language of the Act.

First, the plain meaning of any statute "can be extrapolated by giving words their ordinary sense," *Natural Res. Def. Council v. Muszynski*, 268 F.3d 91, 98 (2d Cir. 2001), and the ordinary sense of the first prerequisite of the statute requires the letters to have been "provided" to DOD by, "made available by," or "produced in cooperation with" a foreign government or international organization. 10 U.S.C. § 130c(b)(1). Here, according to DOD, the ICRC delivers correspondence from family members directly to the detainees, after allowing DOD a review "to ensure that classified or other inappropriate information is not transmitted." *See* Supplemental Declaration of Karen Hecker ("Supp. Hecker Dec.") ¶¶ 7-8. The letters at issue were written by family members and provided to DOD *by the detainees themselves*—they are only in the hands of DOD because provided to the ARB hearing officers during the course of a quasi-judicial proceeding. *See* Declaration of Karen Hecker ("Hecker Dec.") ¶¶ 3e, 5c, 15b(1), 15b(2); *Id.*, Ex.

6 at 616 (presenting letters to ARB), Ex. 7 at 906-07, 911 (same). These letters were not "provided" or "otherwise made available" to DOD by the ICRC, nor were they "produced by" the ICRC. They are therefore not exempt from disclosure under 10 U.S.C. § 130c(b)(1). *Cf. American Civil Liberties Union v. Department of Def.*, 389 F. Supp. 2d 547, 553-56 (S.D.N.Y. 2005) (statute covers reports *produced by the ICRC* and directly *delivered to DOD* concerning treatment of detainees in Iraq); *National Inst. of Military Justice v. U.S. Dep't of Defense*, 404 F. Supp. 2d 325, 338-39 (D.D.C. 2005) (statute covers correspondence between U.S. government and United Kingdom government regarding military commission proceedings). Indeed, they do not even contain the type of "sensitive information of foreign governments" required for the statute to apply. 10 U.S.C. § 130c(a).

Second, even if the first prerequisite could somehow be met, the letters at issue would not be exempt from disclosure because none of the further requirements of 10 U.S.C. § 130c(b)(3) is satisfied. DOD claims that the first alternative condition of sub-section (b)(3) is met since the ICRC "requested in writing" that DOD withhold the documents, DOD Reply Mem. at 16, but its argument ignores an important caveat in ICRC's position: The ICRC does not oppose release when "the concerned internees have freely expressed their consent to the public release of Red Cross Messages sent or received by them." Supp. Hecker Dec., Ex. B. Again, the letters at issue were presented by the detainees to their ARBs during proceedings that were open to the press. *See* January 23 Order at 10; Hecker Dec. ¶ 15b(1) (press present at one ARB where letters were submitted). Under these circumstances, the detainees should be held to have demonstrated the absence of any expectation of privacy in information provided to the ARB.

DOD's new argument to withhold identifying information is on no more solid ground than its original privacy argument. The withheld identifying information should be produced.

C. Exemption 5 Does Not Authorize DOD to Withhold Identifying Information Under A Novel Claim of Litigation Privilege

DOD argues that Exemption 5 also allows it to withhold detainee identifying information contained in its transfer and release decisions because "such information should not be 'available by law . . . in litigation with the agency,' 5 U.S.C. § 552(b)(5)," DOD Reply Mem. at 23, but this provision has no proper application here. Exemption 5 allows an agency to withhold material that would be privileged against production in litigation only when the litigation privilege relied upon is either well-recognized, such as the attorney-client privilege, or specifically mentioned in FOIA's legislative history. *See Burka v. U.S. Dep't of Health & Human Servs.*, 87 F.3d 508, 516-18 (D.C. Cir. 1996). DOD mistakenly asserts a litigation privilege which is neither. According to DOD, some courts presented with habeas petitions have refused to require disclosure in those lawsuits of identifying information contained in DOD's transfer and release decisions because such a release could interfere with the President's wartime powers. DOD Reply Mem. at 23. But, this novel "privilege" has been rejected by eight of the twelve judges who have considered it, *see* Hecker Dec. ¶ 16c(2), and thus is not well-recognized. Nor is this "wartime power" privilege mentioned anywhere in the legislative history of Exemption 5, and DOD does not assert that the national security exemption has any application. Plainly, Exemption 5 does not apply to DOD's theory of privilege. *See United States v. Weber Aircraft Corp.*, 465 U.S. 792, 801 (1984) (a privilege that is novel or not universally accepted does not fall within Exemption 5 unless explicitly discussed in the legislative history); *NAACP Legal Def. & Educ. Fund, Inc. v. U.S. Dep't of Justice*, 612 F. Supp. 1143, 1146 (D.D.C. 1985) (same).

CONCLUSION

For the foregoing reasons and for the reasons discussed in AP's prior memorandum, the Court should deny defendant's motion for summary judgment, and grant AP's motion for an order requiring defendant to provide information that has improperly been withheld under Exemptions 3, 5, 6, and 7(C) and enter such other and further relief as to the Court seems proper.

Dated: March 20, 2006

Respectfully submitted,

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